(1)

Supreme Court, U.S.
FILED

96 627 OCT - 4 1996

No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

FRED DAVIS,

Petitioner,

v.

JOHN J. O'BRIEN,

Respondent.

Petition For Writ Of Certiorari
To The Massachusetts Supreme Court

PETITION FOR WRIT OF CERTIORARI

FRED DAVIS
353 BRYANT STREET
MALDEN, MASSACHUSETTS 02148
(617) 322-8223

17 pp

ISSUES PRESENTED

I.

Should this Court grant certiorari to protect the petitioner's Constitutional Rights granting him a trial by jury which was denied by the lower court.

II.

Petitioner filed in the lower court answer to respondent's Complaint, Counterclaim and request for trial by jury.

III.

Lower court would not allow petitioner witnesses to testify in his behalf.

VI.

Amendment VII Civil trials In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined by any Court of the United States, than according to the rules of the common law.

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Petitioner, Fred Davis, respectifully prays that a writ of certiorari issue to review decision of the Massachusetts Supreme Court and grant the petitioner a new trial by a jury and grant his witnesses to testify in his behalf.

OPINIONS BELOW

The lower Court's ruling was for the respondent.

The Massachusetts Supreme Court's decision for Further Appellate Review was denied, and is attached Appendix A.

JURISDICTION

On July 9, 1996, the Massachusetts Supreme Court denied Further Appellate Review.

This petition is filed within the 90 days of the Massachusetts Supreme Court's decision denying Further Appellate Review.

This Court's jurisdiction is invoked under 28 United States Code.

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

Civil trials In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined by any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

March 3, 1992, the petitioner engaged the services of the respondent to represent him at an Internal Revenue Audit on March 17, 1992.

The respondent reviewed the petitioner's documents and said, "he would represent him at

the Internal Revenue Audit on March 17, 1992".

Later, the petitioner was informed by the Internal Revenue that none of his deductions were allowed because the respondent did not represent him at the March 17, 1992, audit and although another appointment was set-up by the Internal Revenue and the respondent for March 31, 1992, at 10:00 A.M. the respondent also did not appear for this appointment with the Internal Revenue.

Therefore, due to his negligence and wilful misconduct the respondent prejudiced the audit which resulted in disastrous effects causing additional audits for other years and although the the respondent told the petitioner he had no other options, the petitioner was compelled himself to go to the Tax Court to straighten out the damage that the respondent had done to the petitioner.

In, Commonwealth v. Carter 409 Pa Super 184 597A 2d 1156 (19961) "The court held that counsel had a duty to consider possible defense strategies and to discuss with his client options which are available"

Respondent acting pro se filed his action in the Brookline District Court for the amount of $2,475.00. He did not file an invoice/bill with the court. He did not file any logs, rec-

ords, time clock records or diaries to substantiate that he was entitled to this amount of money.

Petitioner files with the Brookline District Court "Defendant's Answer to Plaintiff's Complaint, Defendant's Counter Claim, Jury Request and Notice of Removal to Norfolk Superior Court, and is attached Appendix B.

The action was returned to the Brookline District District Court.

January 22, 1993, pretrial conference at Brookline District. Respondent does not appear. Respondent also does not file a pretrial memorandum. Court awards costs to the petitioner. Petitioner does not receive costs judge's order is crossed out, Respondent's action is dismissed.

Respondent files Motion To Remove Dismissal.

Petitioner files Motion In Opposition To Plaintiff's Motion to Remove Dismissal. Respondent's motion is allowed.

Case goes to trial, Court does not allow the petitioner a jury trial.

The respondent does not have any logs, records, time clock records or diaries etc. He has absolutely no evidence to substantiate the

amount of money he was seeking. The lower Court finds for the respondent.

In fee litigations between lawyer and client the lawyer carries the burden of demonstrating that the fee is reasonable Randolph v. Schuyer 294 NC 496, 201 De 2d 833 (1974) Jacob v. Holston 70 Ohio App 2d 55 434 NE2d 833 (1980) Kennedy v. Clausing 74 Wash 2d 483, 445 P 2d 637 (1968).

If a lawyer takes advantage of his superior technical knowledge or client's inexperience or necessity to gain a fee unwarranted in light of the services and skills that were necessary, the lawyer may be subject to discipline Bushman v. State Bar, 11 Cal Rptr 904, 522 P2d 312 (1974) The Florida Bar v. Moriber, 314 So 2d 145 (Fla 1975).

Clients may also obtain damage penalties under state statutes Doucette v. Kwiat 467 NE 2d 1374, 1 Law Man Prof Conduct 436 (Mass 1984).

June 1, 1993, petitioner filed with the Brookline District Notice of Transfer to Norfork Superior Court.

January 27, 1994, a pretrial conference is held in Norfolk Superior Court. Respondent does not appear in court nor does he file a pretrial

memorandum.

Petitioner filed Defendant's Motion For Default/Dismiss against the Plaintiff, for failure to Comply with Court order which clearly states "Failure to (1) appear or (2) to file a pretrial memorandum will result in automatic default/dismiss. Petitioner's motion is denied.

Judge Connolly set the trial date February 14, 1994 at 8:00 A.M.

Judge Connolly would not allow a jury trial in spite of the fact that petitioner requested a trial by jury, and is attached Appendix B.

Judge Connolly would not allow petitioner's witnesses employed by the Internal Revenue to testify to the fact that the respondent never appeared for any audit for the petitioner nor did he furnish the Internal Revenue with documents that the petitioner gave him to substantiate his deductions.

Judge Connolly allowed the respondent to testify without being sworn to tell the truth.

Judge Connolly rules in favor of the respondent.

The petitioner appeals the lower Court's decision. Now the issue is before this Court.

REASONS FOR GRANTING THE PETITION

1. CERTIORARI SHOULD BE GRANTD TO PROTECT THE PETTTIONER'S CONSTITUTIONAL RIGHT TO TRIAL BY JURY

Seventh Amendment to the United states Constitution provides that the petitioner had a right to a trial by jury.

The lower Court denied the petitioner's Constitutional Rights to a trial by jury. Beacon Theatres, Inc. v. Westover, 1959, 79 S.Ct. 948, 359 U.S. 500 3 L.Ed 2d 988. American Lumbermens Mut. Cas. Co. Of Illinois v. Timms & Howard, Inc. C.C. A 2d, 1939, 108 F 2d 497.

II. THE UNITED STATES CONSTITUTION SEVENTH AMENDMENT MUST BE PROTECTED

The right to a trial by jury as stated in the Seventh Amendment to the United States Constitution must be protected not comprised.

III. THE PUBLIC INTEREST IS INVOLVED

The public interest is involved as Courts

must uphold the United States Constitution. The United States Constitution is not something that is to be disregarded.

Based upon the foregoing, certiorari should be granted to correct the fact that the petitioner's Constitutional Rights were denied when he was not given a trial by jury which was his right under the United States Constitution Amendment Seven.

CONCLUSION

WHEREFORE, Petitioner Fred Davis respectfully prays that this Honorable Court grant this petition and issue a writ of certiorari to review the fact that the petitioner's Constitional Rights were denied when he was denied a trial by jury or grant any other appropriate relief.

Respectfully submitted,

Fred Davis
353 Bryant Street
Malden, Massachusetts 02148
(617) 322-8223

APPENDICES

App. 1

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

1412 Courthouse, Boston, Massachusetts 02108

Fred Davis
353 Bryant Street
Malden, Ma 02148

RE: DOCKET NO. FAR-08554

JOHN J. O'BRIEN
VS.
FRED DAVIS

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on July 9, 1996, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: July 9, 1996

To: Charles R. Levin, Esquire
Fred Davis

APPENDIX B

App. 2

TRIAL COURT OF THE COMMONWEALTH
DISTRICT COURTS OF MASSACHUSETTS

BROOKLINE DIVISION

NORFOLK, SS. CIVIL ACTION NO. 9209RM0043

John J. O'Brien, Plaintiff

VS.

Fred Davis, Defendant

I have received the following documents:

1. Defendant's Answer to Plaintiff's Complaint and Defendant's Counterclaim Jury Request

2. Notice of Removal to Norfolk Super Court

Stamped

Received October 20, 1992
Brookline Division
District Court

Supreme Court, U.S.
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No. _____ CLERK

In The

Supreme Court of the United States

October Term, 1996

FRED DAVIS,

Petitioner,

v.

JOHN J. O'BRIEN,

Respondent.

SUPPLEMENTAL APPENDIX

To The Massachusetts Supreme Court

FRED DAVIS
353 BRYANT STREET
MALDEN, MASSACHUSETTS 02148
(617) 322-8223

6 pp

APPEALS COURT DOCKET

CASE 95-P-001288 Case PARTY 0001
Type/Desc A CONTACT
Entered 07/26/95 Appellant Brief 10/24/95
Cnty/Div Code NO Appellee Brief 12/18/95
Summary Case? B Oral Arg TIME : M
Court Code SC Last Trans 07/09/96
Last Status CLSD.....on 06/05/96

P/D	Party Name	Applnt	Attorney Name
P	OBRIEN, JOHN	-	566060- JACOBSON, NEIL L 10 KEARNEY RD STE 305 NEEDHAM, MA 02194 LAW OFFICE OF CHARLES R. LEVIN 449-7400
D	DAVIS, FRED		90253P-DAVIS, FRED 353 BRYANT STREET MALDEN, MA 02148

Actions	07/26/95	1	ENTERED. #92-2678.
	08/22/95	2	APPT'S MTN: EXTEND B/A.
	08/23/95	-	RE#2 ALLOWED TO 10/11/95. *NOTICE.
	10/02/95	3	APPT' MTN: EXTEND B/A
		-	RE#3 ALLOWED TO 10/26/95. NOTICE.
	10/24/95	4	APPT'S CERT OF SERVICE B/A
	12/18/95	5	APLE'S MTN: EXTEND BRIEF.
		6	APLE'S MTN: FILE RESPONSE IN LIEU OF BRIEF W/ATTACH.
		7	APPT'S MTN: OPP TO PAPER

APPEALS COURT DOCKET
(CONTINUED)

Actions	12/18/95	7	#5 W/ATTACH.
		8	APPT'S OPP TO PAPER #6 W/ATTACH.
		-	RE#5 ALLOWED TO 12/18/95. *NOTICE.
		-	RE#6 ALLOWED. *NOTICE.
		9	APLE'S CERT OF SERVICE: MEMO IN LIEU OF BRIEF.
	12/19/95	-	RE#7 DENIED. NOTICE.
		-	RE#8 NOTED. NOTICE.
	05/01/96	10	ORDER DISMISSING APPEAL AFFIRMED.
		-	DECISION: RULE 1:28. (S-PD-I) *NOTICE/IMAGE
	05/13/96	11	APPT'S PETITION FOR REHRG. W/ATTACH.
	06/05/96	12	ORDER: PETITION FOR REHRG. DENIED. (S-PD-I) *NOTICE/ IMAGE.
		-	RESCRIPT TO TRIAL CT.
	06/10/96	-	COPY OF APPT'S FAR.
	07/09/96	-	FAR DENIED

Type/Nbr	Assoc'd	Tpe/Nbr	Assoc'd	Counsel

APPENDIX D

APP. 5

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

95-P-1288

JOHN J. O'BRIEN

vs.

FRED DAVIS

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Where the defendant claimed that the trial judge's findings and conclusion were not supp-orted by the evidence pursuant to Mass.R.A.P 8 (b), the defendant's appeal was property dismissed by a Superior Court Judge for failure of the defendant to furnish to the trial court a trial court a transcript of the defendant's jury waived trial. See Russell v.McCwen-Hanelt, 413 106 (1992), cert. denied, 113Ct. 973 (1993). The fact that the defendant appears pro se does not excuse his noncompliance with appellate rules. Pandex v. Roulston, 419 Mass. 1010, 1011 (1995).

The plaintiff-appellee's motion for sanctions is denied.

Order dismissing appeal affirmed.
By the Court(Smith, Porada, &
Ireland, JJ.),

"s/ Ashley Ahern, Asst. Clerk

Entered: May 1, 1996